Gerahty and Mudie, JJ., concurred.

The Order made was:—

Appeal allowed. Judgment below upheld upon the question of annulment of the sale and reversed upon the question of damages. The appellant to recover against the 1st respondent two-thirds of his costs to be taxed as between party and party both here and below. The appellant to pay the costs of the 2nd, 3rd and 4th defendants in the Court below, and the costs of the 2nd and 4th respondents in this Court, all to be taxed as between party and party.

[APPELLATE CIVIL JURISDICTION]

TAN SOO (f)

AND

FREEMAN & MADGE.

[KUALA LUMPUR CIVIL APPEAL No. 2 OF 1932]

Solicitor & Client—Agreement as to costs—Necessity for writing—Oral contract unenforceable by Solicitor—Petition for recovery of balance of costs—Ascertainment of proper charges—Advocates & Solicitors Enactment No. 22 of 1914, Ss. 22, 23, 24, 26 & 30; Attorneys & Solicitors Act of 1870.

A firm of Advocates & Solicitors had acted for a client in a successful appeal. They delivered a bill of costs as between party and party to the unsuccessful party, which, after taxation, was paid. They paid to the client the amount of out of pocket expenses and retained the balance. The client filed a petition to the Court under S. 26 of the Advocates & Solicitors Enactment for recovery of the balance in the hands of the Solicitors. The petitioner based her claim upon an oral agreement to the effect that all moneys recovered by her Solicitors as costs should be paid to her. The existence of the oral agreement was denied.

Held, that the petitioner should have pursued her remedies by way of action and not by petition.

Held further, that Ss. 22, 23, 24, and 30 of the Advocates & Solicitors Enactment have no application to an oral agreement between an Advocate & Solicitor and his client.

Held further, that such an agreement, being unenforceable by the Solicitors, the position, so far as they are concerned, is as though no agreement has ever been made between the parties.

Held further, that under the circumstances the Solicitors should be paid their proper charges to be ascertained by taxation.

Appeal to the Court of Appeal by Messrs. Freeman & Madge from the order of the Chief Justice, F.M.S. made on the 18th December, 1931.

Shearn (*Seenivasagam* with him), for the Appellants.

Respondent did not appear.

Shearn in opening the appeal stated that the appellants Messrs. Freeman and Madge were loth to appeal but at the request of the Bar Committee had consented to do so in order that a matter of great importance to the public and to the Bar might be submitted to the Court of Appeal for a ruling.

The Chief Justice had decided that the universal practice of the Bar was incorrect. The Bar Committee did not consider the decision of His Lordship to be in accordance with the authorities and it was desired to have a decision by the Court of Appeal. Messrs. Freeman and Madge did not wish to put a former client to trouble and expense and counsel was instructed that no matter what might be the result of the appeal no order for costs against Tan Soo was to be asked for nor would she be called upon to return any moneys already paid to her as a result of the decision in the Court below. Counsel, proceeding, directed the Court's attention to the irregularity of the procedure in the court of the Judge.

The Chief Justice should have decided the case in accordance with certain English cases which he quoted and he pointed out that the law as administered in India was similar to the law of England in this respect. The view he asked the Court to take was that as the arrangement between the solicitors and the client had not been reduced to writing, the proper order for the Judge to have made was that the solicitors should be directed to tax their bill as between solicitor and client. The Chief Justice had not made a correct order. He had applied certain sections of the Advocates and Solicitors Enactment but not others. The true position was that none of those sections applied at all to verbal agreements. He had found part of the contract bad and part good, whereas the contract was entire and indivisible. The effect of the

judgment in the Court below was that the Chief Justice had made a new bargain for the parties. If the contract was void, whether because it was not in writing or for any other reason, then the party who had the benefit must make proper compensation for the benefit received. In the case of solicitor and client the client must compensate the solicitor according to the known scale. The way to ascertain the amount was by taxation of a Bill of Costs. The Chief Justice had not had regard to Section 65 of the Contract Act.

The Court allowed the Appeal. The judgment of the Court was delivered by the Acting Chief Justice.

THORNE, AG. C.J.—This is an appeal against the judgment of the learned Chief Justice dated Dec. 18, 1931, upon a question of costs which arose out of a petition presented to the Court by the respondent, which was treated as being a petition under the provisions of section 26 of the Advocates and Solicitors Enactment, No. 22 of 1934.

Before I go into the merits of the appeal, I should like to say this—that, while the Court is always willing to assist a litigant, in my humble opinion, it is the duty of every member of the staff of the Court so to do—the record in this matter discloses the undesirability of an indifferent practice in the conduct of litigation even when the litigant is in person.

The learned Judge below was faced with certain difficulties which, in my view, would not have arisen if a more stringent compliance with the rules of practice had been enforced.

The facts of this case are as follows. Messrs. Freeman and Madge, a firm of advocates and solicitors practising in Kuala Lumpur, were retained by the respondent to appear for her at Raub in Magistrate's Civil Appeal No. 2/30. The respondent succeeded, the appeal being dismissed with costs. Messrs. Freeman and Madge then proceeded to tax the bill of costs, and the amount of the allocatur was paid. They then paid to the respondent the sum of $18.10, being her out of pocket expenses, but the respondent considered herself entitled to claim from them payment of the balance of the amount of the allocatur in their hands. They failed to share this view of hers, and she then petitioned the Chief Justice.

In my humble opinion, to construe this petition as one under section 26 of the Advocates and Solicitors Enactment was a mistake. I do not mean that it was necessarily a mistake of the learned Judge, it may have been a mistake of the Registrar. What was the position? The respondent claimed of her solicitors a sum of money. The usual way to recover such a claim is by way of an action.

Notwithstanding the provisions of section 26 of the Advocates and Solicitors Enactment, the respondent could, in my view, have brought her action to recover the amount she claimed as money had and received by the appellants on her behalf, and they would then have set up the oral agreement, and have pleaded in the alternative their right to set off the amount due to them for costs.

Assuming that this had been done, it would have been clear that the appellants were setting up the oral agreement in answer to the claim of the respondent, and if, as happened in this matter, they had failed to establish the agreement, the matter would have been referred to the taxing officer to tax their costs.

However that may be, the matter came before the Court, and it was contended by the respondent that the bargain between herself and her solicitors was that, if any costs were recovered from her opponent in the litigation, the amount must be paid over to her. Messrs. Freeman and Madge do not agree that this was the agreement. The learned trial Judge found as a fact that the agreement was that her solicitors should conduct the appeal for an inclusive fee of $100, and that if the appeal was dismissed with costs, all costs recovered from the appellant in that matter should be received by Messrs. Freeman and Madge as part of the remuneration. The finding of the learned Judge below was, therefore, against the respondent.

The learned Judge held that this was a verbal agreement between advocates and solicitors and their client, and that, as it was not in writing, it had no statutory validity under sections 22, 23, 24 and 30 of the Advocates and Solicitors Enactment, but he held that the provisions of Sections 23, 24 and 30 of that Enactment, none the less were applicable.

Section 22 of the Enactment provides that it shall be lawful for an advocate and solicitor to make an agreement in writing with his client respecting the amount and manner of payment of the whole or any part of his costs. Sections 23 and 24 begin with the words 'such agreement,' *i.e.* an agreement in writing, and the provisions of those sections are restricted in terms to written agreements. In my view the legislature has in clear terms restricted the application of the provisions of those sections to agreements in writing and to those only. Oral agreements between members of the profession and their clients are not covered by these sections.

Mr. Shearn for the appellants referred us to the case of *In re Russell, Son and Scott*, 30 Ch. D. page 114, which decided that since the Attorneys and Solicitors Act 1870, a verbal agreement by a client to pay his solicitor a lump sum in discharge of part costs is not binding on the client. The judgment makes it clear that since the Act, if the solicitor does not procure an agreement in writing, the clent is not bound by the agreement.

The same matter came before the Court of Appeal at a later stage, and is reported in 55 L.T.R. (N.S.) page 71.

The solicitors there carried in a bill for taxation charging a lump sum of £1,000 being the amount agreed to be paid under the particular agreement, and it was held that although the particular agreement was invalid and could not be enforced by the solicitors, they could not charge against their client more than the £1,000.

He also referred us to the case of *Clare* v. *Joseph*, 1907, 2 K.B. page 369, where it was held that, while an agreement made between a solicitor and his client is not enforceable by the solicitor if not made in writing, it may, none the less, be enforced by the client against the solicitor.

None of these cases were quoted to the learned Judge below.

The local sections reproduce in substance the relative provisions of the English Act of 1870.

I am disposed to think that if these authorities had been before the learned Judge of first instance, he would not have decided that the provisions of sections 22, 23 and 30 of our Enactment had any application to the case of an oral agreement between an advocate and solicitor and his client.

With the greatest respect which I entertain for the opinion of the learned Judge, I think that his view of this matter was erroneous, and I hold that the provisions of these sections have no application to the case of an oral agreement between an advocate and solicitor and his client.

The learned Judge below then went on to consider whether this oral agreement was champertous, and, holding that it was, declared it to be void, and proceeded to make orders dealing with the monies in the hands of Messrs. Freeman and Madge.

I wish to be careful to avoid any expression of opinion as to whether or not this agreement is champertous. Indeed I wish to be careful to avoid any expression of opinion whatever upon the question whether or not the law of England with regard to champertous or maintenance agreements or any similar provision of the law of England has effect in the Federated Malay States.

I regard it as unnecessary so to do for the reason that the agreement here being oral is unenforceable at the instance of the advocate and solicitor, and the position then, so far as he is concerned, is as though no agreement had ever been made between himself and his client.

What then is the position, and what are the rights and liabilities of the parties?

The contract alleged not being a contract in writing within the provisions of the Enactment, is not enforceable by the appellants. The contract is enforceable by the respondent. Here, I deal only with the facts of this particular case. The respondent has chosen, by her petition and by her conduct, to allege a contract different in terms to that which was agreed to between the parties, and, in my view, she cannot now be heard to say that the contract was different to that which the learned Judge has found.

Let us consider the position of the respondent if as I have suggested, she had sued the appellants, the case had been heard, and judgment delivered to the same effect as the agreement found here. The respondent would be bound by the judgment, and her only remedy would be to

appeal. On that finding of fact the appellants would have been entitled to judgment, unless the agreement were for some reason held void.

I go further. Even if the agreement here is void as being champertous, the consequential order was, in my view, not correct. Assuming, for the sake of this argument, that a question had arisen between a solicitor and his client as to the amount of the remuneration, and the petition was presented properly to the Court under section 26 of the Advocates and Solicitors Enactment, there being no contract enforceable by the solicitor against the client, is he to be paid no remuneration whatever for the professional services he rendered to his client, more especially when, as here those services were successful, and the client has already had the benefit of those services? Where a person takes the benefit of a contract of service, and there is no contract fixing the amount of the remuneration the law implies a bargain to pay reasonable remuneration. In the case of litigants, other than members of the profession, the services rendered have to be measured, and evidence led proving what is reasonable remuneration; in the case of members of the legal profession, the proper way to arrive at the amount of their remuneration is by taxation by the Registrar. Section 27 of the Enactment makes provision for this.

It seems to me, therefore, that the proper order for the learned Judge to have made in this case was a reference to the Registrar to tax the appellants' costs. And after having received from the proper taxing officer a certificate of the result of the taxation, to have reviewed it, if necessary.

The learned Judge, as I have said, has declared that contract to be void as being champertous. He declared it thus to be void in part only, and treated the contract as a several one. With great respect to the learned Judge, I am unable to share his view.

It seems to me that on his finding the contract was not capable of being served, and of being declared good in part and bad in part.

The fundamental consideration to the solicitor was, it is true, two-fold, namely, in consideration of the fact that they should receive any costs awarded as between party and party as a result of the appeal, and of her paying them a sum of $100 in cash, they undertook to conduct the appeal. Now, how is that considered to be split? It may very well be said that when the parties were negotiating, but for the bargain that they should receive the party and party costs, the appellants would not have agreed to conduct this case at Raub for so small a fee as $100.

It seems to me that it is impossible for the Court to sever that consideration. Having found the bargain void, the Court is proceeding to enforce part of the bargain only, and that perchance to the prejudice of one of the parties.

The English cases to which I have referred indicate that such a contract is unenforceable at all in whole or in part. Section 27 of the Enactment seems to indicate that if the Court deems the terms of an agreement not to be fair and reasonable, it must declare the whole agreement void, so that if this were an agreement in writing, the Court could not declare if good in part and bad in part.

My view of the matter is that, if this contract be void, or if it be a contract which is not enforceable by the advocate and solicitor under the Advocates and Solicitors Enactment, then the case falls within the provision of the Contract Enactment section 65, which reads:—

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The authority for that proposition is the case in the Indian Law Reports, 53 Madras page 309 at page 317. If, then, the contract be void, as the learned Judge has held in this matter, then it is void *ab initio*, the position of the parties being the same as though no agreement had been entered into. In such circumstances the law implies that a member of the profession who has rendered services is entitled to be paid his proper charges. The members of the legal profession practising in the Federated Malay States have only one way of having their charges properly ascertained, and that is by way of taxation.

In my humble opinion this appeal should be allowed, the order of the learned trial Judge should be reversed, the matter should be taken before the Registrar to tax the bill of the appellants as between solicitor and client. As a result of that taxation, the Court will be in a position to make any order which is necessary.

As I understand from counsel that this matter has been brought to this Court of Appeal only on a question of principle, and the (appellants) solicitors have given an assurance that they will in no circumstances take any action in this matter arising out of any order by this Court, there will, therefore, be no consequential order made.

The appeal is accordingly allowed and order made that the deposit in Court be paid out to the appellants.

Mudie and McFall, JJ. concurred in this judgment.

[ORIGINAL CIVIL JURISDICTION]

IN THE MATTER OF THE ESTATE OF HAJI TAMBY BIN HAJI MOHAMED SALEH DECEASED

HAJI ABDUL LATEEF BIN HAJI TAMBY AND ANOTHER.

v.

HAJI TAIB BIN HAJI ASHIM EXECUTOR OF THE WILL OF HAJI MAKADOM BINTE HAJI TAMBY DECEASED AND OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 72 of 1931]

Will—construction—"heirs as ascertained according to Mohammedan Law" surplus income derived from residuary contingent gift.

A Muhammadan testator devised and bequeathed "all my real and personal estate and effects movable and immovable either in Malacca or Singapore the Federated Malay States or elsewhere not already specifically devised unto my trustees or trustee upon trust to pay out of the income of the said estate my debts funeral and testamentary expenses legacies and annuities bequeathed free of duty and after 21 years from my death to sell call in and convert the same into money and the money so realised to divide among my heirs as then ascertained according to Mohammedan law."

Held, that the words "heirs as then ascertained according to Mohammedan law" mean those persons who would be the testator's heirs according to the Mohammedan law if he had died at the expiratino of 21 years from the actual date of his death.

Held further, that the gift at the expiration of the period of 21 years of the residue, carried with it surplus income arising out of the residue during such period and not exhausted by the trusts declared in respect of such income.

This was an originating summons for the construction of the Will of the abovenamed deceased which came on for hearing before Terrell, J.

Goho for the Plaintiffs.
Koek for the 1st Defendant.
Cobbett for the 2nd Defendant.
Roland Braddell for the 3rd Defendant.

Cur. Ad. Vult.

11-9-31.

TERRELL, J.—This was an originating summons for construction of the Will of Haji Tamby bin Haji Mohammed Saleh deceased. It was agreed between counsel that the matters arising for decision were the following:—

(1) Whether under clause 10 of the Will the corpus of the estate after the expiration of a period of 21 years was divisible among the testator's heirs living at his death and their representatives now living, or whether such corpus is divisible among an artificial class of persons who would have been the testator's heirs if he had died at the expiration of the period of 21 years.

(2) Whether the surplus income under clause 8 of the Will was validly disposed of.

Clause 10 of the Will reads as follows:—

"I devise and bequeath all my real and personal estate and effects movable and immovable either in Malacca or Singapore the Federated Malay States or elsewhere not already specifically devised unto my trustees or trustee upon trust to pay out of the income of the said estate my debts funeral and testamentary expenses legacies and annuities and duties payable on the legacies and annuities bequeathed free of duty and after 21 years from my